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No. 91-1680

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN C. JUSTICE, PETITIONER

v.

LYNN MARTIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly assessed petitioner with attorneys' fees and costs for refusing to comply with an inspection warrant issued under the Occupational Safety and Health Act of 1970.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 951 F.2d 121. The order of the district court (Pet. App. i) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1991. On April 3, 1992, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including April 15, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On February 10, 1989, the district office of the Occupational Safety and Health Administration (OSHA) in Calumet City, Illinois, received an unsigned letter stating:

> I am writing this for a friend who wants to make a complaint about working conditions in a factory at 1699 S. 55th Ave. Cicero, Ill. 60650 tel no. 656-3250. MICROCOSM is the name. The smell from solvents used in the factory is so bad, my friend is sick practically every day. Others have the same problem. Something should be done about it because the Boss will not do anything about it. I hope you can visit the factory to see for yourself.
>
> My friend does not want his name used and neither do I because I am only trying to help him get some relief.

Pet. App. 2; see *id.* at xxxix. The OSHA Area Director sent a letter to Microcosm on February 22, 1989, informing it that OSHA had received a complaint concerning solvent vapors that were making employees ill. *Id.* at 3. OSHA explained in the letter that it did not currently intend to conduct an inspection, but it requested that Microcosm itself "investigate the alleged conditions" and report to OSHA the results of the investigation, and any corrective action taken, within ten days. *Id.* at 2-3.

Petitioner is the owner of Microcosm. Rather than investigate the alleged conditions, petitioner responded that he "inquired exhaustively and * * * found no one at this address who has complained to your agency as set forth in your letter dated February 22, 1989." Pet. App. 3. OSHA repeated its request that Microcosm investigate the conditions. *Ibid.* On August 30, 1989, an OSHA compliance officer attempted

to inspect Microcosm, but petitioner refused to allow the officer to enter the property. *Id.* at 3-4. When an OSHA representative contacted petitioner by phone, petitioner refused to discuss the matter. *Id.* at 4.

2. On October 16, 1991, OSHA applied for and received an inspection warrant from a magistrate in the United States District Court for the Northern District of Illinois. Pet. App. 4. The next day, an OSHA compliance officer attempted to inspect the Microcosm premises pursuant to the warrant, but petitioner denied the officer entry. *Id.* at 5. On October 25, 1989, the district court ordered petitioner to show cause why he should not be held in contempt for refusing to obey the warrant. *Ibid.* Following a hearing on October 31, 1989, the court held petitioner in contempt and ordered him to allow an inspection. *Ibid.*

The following day, the compliance officer again attempted to inspect the premises, but petitioner merely allowed the officer to enter the front door, claiming that Microcosm consisted only of an office and hallway. Pet. App. 5. After OSHA renewed its motion for contempt, petitioner agreed to allow an inspection, which took place on February 15, 1990. *Ibid.* On May 23, 1990, in its final order on contempt sanctions, the district court awarded OSHA $619.79 in attorneys' fees and costs for its efforts in attempting to execute the warrant. The court of appeals affirmed that award. *Id.* at 5-6; see *id.* at i.*

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* The district court additionally sanctioned petitioner $1500, but OSHA agreed that the sanction should be vacated. Pet. App. i, 6. Following the inspection, OSHA issued citations for numerous serious and willful violations of occupational safety and health standards. It proposed penalties totalling $12,940. OSHA and petitioner eventually entered into a settlement concerning those citations. See *id.* at xiii-xvi.

ARGUMENT

The court of appeals correctly concluded that the magistrate issued a valid OSHA inspection warrant, that petitioner contumaciously refused to comply with the warrant, and that petitioner therefore was liable to OSHA for attorneys' fees and costs associated with his contempt. Petitioner presents no issue warranting this Court's review.

The Occupational Safety and Health Act of 1970 authorizes OSHA to "inspect and investigate" any place of employment within its jurisdiction to carry out the purposes of the Act. See 29 U.S.C. 657(a). In this case, the OSHA properly applied for and received a judicial warrant to inspect petitioner's premises after petitioner failed take action in response to OSHA's informal inquiry concerning alleged health and safety violations. The court of appeals correctly rejected petitioner's argument that only a district judge could issue the warrant, noting that "it is well-established that magistrates are authorized to issue OSHA search warrants." Pet. App. 6-7. See, *e.g.*, *In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335, 1340 (7th Cir. 1979); see also 28 U.S.C. 636.

OSHA's warrant application satisfied this Court's ruling in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978), that the agency could obtain a warrant by providing specific evidence of a health or safety violation. As the court of appeals explained (Pet. App. 7-8), OSHA's receipt of a credible anonymous complaint alleging a specific violation provided a sufficient basis for the inspection warrant in this case. See, *e.g.*, *Marshall* v. *Horn Seed Co.*, 647 F.2d 96, 100 n.3 (10th Cir. 1981); *Burkart Randall Division of Textron, Inc.* v. *Marshall*, 625 F.2d 1313, 1321-1322 (7th Cir. 1980). As that court also explained (Pet. App.

8 n.4), OSHA was not required to publish notice in the *Federal Register* that it would conduct inspections based on informal complaints. Cf. *United States* v. *Alaska*, 112 S. Ct. 1606, 1618-1619 (1992).

The court of appeals correctly observed that petitioner's remaining arguments are either frivolous or were waived below. See Pet. App. 6, 11-12. The inspection warrant was valid and petitioner was properly assessed attorneys' fees and costs for his failure to comply.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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